IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 760

MICHAEL VIGNERA,

Petitioner,

vs.

NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR THE PETITIONER

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January 11, 1966.

INDEX

CITATIONS

Cases:

CONSTITUTION AND STATUTES

MISCELLANEOUS

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Opinions Below

The memorandum decision of the Appellate Division of the Supreme Court, State of New York, Second Judicial Department, affirming petitioner's conviction, is reported at 21 App. Div. 2d 752, 252 N.Y.S.2d 19 (1964) (R. 33). The memorandum decision of affirmance of the New York Court of Appeals is reported at 15 N.Y.S.2d 970, 207 N.E.2d 527, 16 N.Y.2d 614, 209 N.E.2d 110 (1965) (R. 36-41).

Jurisdiction

The judgment of the New York Court of Appeals was entered April 15, 1965 (R. 36) and amended May 20, 1965 (R. 40). The petition for writ of certiorari was filed July 10, 1965, and was granted November 22, 1965. 86 Sup. Ct. 320. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented

1. Whether a confession, elicited from a suspect prior to arraignment by an assistant district attorney and recorded by a stenographer when the suspect has been detained by the police for approximately twelve hours, has become the focus of investigation, and has not been advised of his right to counsel or of his right to remain silent, is rendered constitutionally admissible against him in a state criminal trial by his failure to request counsel.

2. Whether the twenty-four hour detention of an uncautioned prospective defendant for the purpose of eliciting incriminating statements prior to arraignment is a violation of his constitutional rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments such as to render testimony as to the statements thus elicited inadmissible against him in a state criminal trial.

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are set forth in Appendix A, *infra*, pp. 45-47.

Statement

On August 30, 1961, petitioner was convicted of first degree robbery by the County Court, Kings County, following a three-day trial to a judge and a jury. On November 3, 1961, he was adjudged a third-felony offender and was sentenced to thirty to sixty years imprisonment pursuant to Section 1941 of the New York Penal Law (R. 3).

Thereafter, the United States District Court for the Western District of New York sustained a writ of habeas corpus filed by petitioner attacking the constitutional validity of a prior felony conviction, on the ground of deprivation of counsel. *Vignera* v. *Wilkins*, Civ. 9901 (W.D.N.Y. Dec. 31, 1961) (Henderson, D.J.). Pursuant to the order of the district court, petitioner was remanded for resentencing as a second-felony offender and, on February 6, 1963, was resentenced for the same term, thirty to sixty years imprisonment (R. 31-33).

The Appellate Division, Second Department, affirmed the judgment on resentence, without opinion, and dismissed as moot an appeal from the original judgment of November 3, 1961 (R. 34-35). By order dated May 25, 1964, as amended on June 22, 1964, the Appellate Division denied petitioner's motion for reargument and stated that the judgment rendered on resentence superseded the original judgment of November 3, 1961. Leave to appeal to the New York Court of Appeals was granted by certificate of Judge Stanley H. Fuld, dated June 23, 1964. On April 15, 1965, the Court of Appeals affirmed the judgment of the Appellate Division (R. 36-37). On May 20, 1965, the Court of Appeals ordered the remittitur amended to read as follows:

"Upon the appeal herein there were presented and necessarily passed upon questions under the United States Constitution, *viz.*:

"1. Whether, in the circumstances of this case, the admission in evidence of a confession elicited prior to arraignment by an Assistant District Attorney from defendant-appellant and recorded by a stenographer constituted a denial of his rights under the Fourteenth Amendment to the United States Constitution;

"2. Whether, in the circumstances of this case, the admission in evidence of police testimony as to statements elicited from defendant-appellant constituted a denial of his rights under the Fourteenth Amendment of the United States Constitution.

"The Court of Appeals held that no rights of the defendant-appellant under the Fourteenth Amendment to the United States Constitution had been violated." 16 N.Y.2d 614, 209 N.E.2d 110 (1965) (R. 40-41).

Petitioner's motion for leave to proceed *in forma pauperis* was granted on November 22, 1965 (R. 41).

1. *The Crime.* The testimony at the trial established the following facts: At about 5:30 in the evening on Tuesday, October 11, 1960, a man entered the Chapeaux de Mode, a dress shop owned by the complaining witness, Harry Adelman, located at 4822 13th Avenue in the Borough of Brooklyn, New York City. With a knife in his hand, the man required Mr. Adelman to surrender cash contained in the register along with cash, travelers checks, and one or more credit cards in Mr. Adelman's pocket. Before departing

the dress shop, he forced Mr. Adelman, Mrs. Gertrude Adelman, and Mrs. Anita Waldinger, a saleslady, into the washroom (R. 6-10).

On Friday morning, October 14, 1960, Edward Nemeth was arrested at a store on Madison Avenue, Manhattan, while attempting to purchase jewelry with Harry Adelman's Diner's Club credit card (R. 28). Nemeth apparently told the police he had been given the credit card by petitioner and where petitioner lived (R. 27-28). The Diner's Club card was later introduced in evidence (R. 27).

2. *The Detention.* Shortly after Nemeth's arrest and the recovery of the Diner's Club card, petitioner was picked up by the police and taken to the 17th Detective Squad on East 49th Street in Manhattan (R. 24). Some time thereafter, he was taken from the 17th Detective Squad to the 66th Detective Squad where he was identified by Mr. Adelman and Mrs. Waldinger as the man who entered the Chapeaux de Mode on the evening of October 11 (R. 11-12, 24). It is not clear from the record at what time petitioner was brought to the 17th Detective Squad or at what subsequent time he arrived at the 66th Detective Squad. However, Mrs. Waldinger testified she saw him at the 66th Squad some time in the morning (R. 17).

At the trial, Police Detective John Gillen was asked on cross-examination where petitioner was first arrested:

> "A. He was taken into the 17th Squad and then he was brought to the 66th.
>
> "Q. Where is that?
>
> "A. East 49th Street, Manhattan. Then he was brought into the 66th Detective Squad where we questioned him and placed him under arrest." (R. 24.)

Detective Gillen testified he questioned petitioner—apparently after the identification by the complaining witness and the eyewitness (R. 22)—as to "whether he had committed the holdup at the place and he stated he had" (R. 23). Detective Gillen further testified that petitioner admitted he had obtained about ninety-three dollars and that he identified Mr. Adelman and Mrs. Waldinger as the persons he had robbed (R. 23-25).* By his questioning, Detective Gillen established that the escape from the scene of the crime had been made along 49th Street to the 49th Street elevated station and that a toy gun had been employed (R. 23).

At about 3:00 p.m. on the day of his apprehension, petitioner was formally arrested (R. 22). Still later that day, he was taken by other policemen to the 70th Precinct in Brooklyn "for detention" (R. 25). There, at approximately 11:05 p.m., he was visited by Assistant District Attorney Postal, who questioned him in the presence of Vito Lentini, a "hearing reporter" (R. 19-22, 30-31).** The questions

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* This account of the identification process, that is, the accused identifying the victim, avoided any hearsay problem. *Cf. Veney* v. *United States*, 344 F.2d 542 (D.C. Cir. 1965) (concurring opinion) (spontaneous apology).

** The ex parte deposition technique appears to be a common procedure of the New York District Attorneys rather than a distinguishing feature of this case:

> "Under normal procedure, an assistant district attorney, who is on homicide call in New York County 24 hours a day, is called to talk to a suspect only after the suspect has made a statement to the detectives in which he has admitted the crime.
>
> "Occasionally the detectives will call the assistant district attorney and say something like: 'He hasn't broken yet, and it's been two hours.'
>
> "Quite often the prosecutor will reply: 'Call me again in an hour. Keep working.' *(footnote continued on next page)*

covered virtually all the circumstances of the crime, expanding upon the questions put earlier by Detective Gillen (R. 30-31). Mr. Lentini, over objection, was permitted to read to the jury his notes of the questions posed by Mr. Postal and the answers given by petitioner; the transcript of those notes, Statement No. 2294, Folio No. 91 (R. 30-31), was apparently received in evidence (R. 20). The transcript purports to be a verbatim account of what was said by the parties, and recites the time of the commencement and close of the examination and the persons present. It includes no warning or caution of any kind (R. 30-31).

Some time the following day, Saturday, October 15, petitioner was taken to court for arraignment. In the patrol wagon "going to court" he was again questioned by Detective Gillen, who established that a knife rather than a toy gun had been used in the commission of the crime and that the knife had been thrown away (R. 23).

On cross-examination, immediately after Detective Gillen had testified that petitioner was brought to the 66th Squad to be questioned and placed under arrest, he was asked: "Did you advise him of his right to counsel?" That question was objected to by the prosecution, the objection was sustained by the trial court, and hence the question went unanswered (R. 24).

"Occasionally also—and this is at the discretion of the prosecutor on duty—he will proceed to where the suspect is being questioned before the suspect has made any admissions.

"This visit is to discuss the case with the detectives and possibly guide them to other facets of their inquiry. Normally, however, an assistant district attorney responds only when he is told a suspect has made a confession.

"At those times the prosecutors appear with stenographers, also attached to Mr. Hogan's office, to take down the confessions, which the District Attorney's officer prefers to call statements." N.Y. Times, Jan. 28, 1965, p. 1, col. 5, p. 17, col. 6.

Summary of Argument

I.

It is plain that the assistance of counsel guarantee of the Sixth Amendnment was violated in the present case when petitioner's deposition was taken by an assistant district attorney. At that point in time, some ten or twelve hours after petitioner had been apprehended, after he had been singled out by a confederate and linked to stolen property, after he had been identified by the victim and an eyewitness to the crime, after he had made incriminating statements to the police officers, and after he had been formally arrested, the criminal proceeding against him had begun. Indeed, it probably had begun several hours earlier, shortly before his initial questioning. At that point, petitioner had been implicated by a confederate, identified at the station house by the complaining witnesses, and presumably confronted with the stolen property already recovered. In any event, by the time of his recorded confession, taken by a member of the bar who came to the station house prepared, that is, accompanied by a stenographer, petitioner was still unadvised of his absolute right to silence and of his right to counsel. He remained ignorant of those rights throughout the interrogation by the assistant district attorney; he was just as ignorant the next morning in the patrol wagon when, under further questioning, he partially recanted and added an important element to the confession.

In view of *Escobedo* v. *Illinois,* 378 U.S. 478, the conviction must be reversed, notwithstanding petitioner had not retained counsel prior to his apprehension and failed to request counsel during his detention. The absence of a request to communicate with counsel does not distinguish

the present case from *Escobedo*, because the accusatory stage of the proceeding against petitioner had been reached by the time he fully confessed, if not long before. The situation here is actually more persuasive than Escobedo's, for there is every reason to believe that prior to his confession Escobedo was aware of both his right to silence and his right to counsel, and the police case against him was still slim.

II.

The conviction should be reversed on the independent ground that petitioner's recorded confession was obtained during a period of illegal detention. In light of *Malloy* v. *Hogan*, 378 U.S. 1, and *Griffin* v. *California*, 380 U.S. 609, petitioner's privilege against self-incrimination under the Fifth and Fourteenth Amendments was violated when his recorded confession and the testimony of the police officer were admitted at the trial stage of the proceeding. By the time of the confession to the assistant district attorney, and even more certainly by the next morning when a further admission was elicited by the detective, the continuance of police custody without judicial intervention had become unlawful. It amounted to a kangaroo imprisonment, authorized by no judge, statute, or constitution. In fact, it was expressly forbidden by New York's prompt arraignment statute, Section 165, Code of Criminal Procedure (Appendix A, *infra*, p. 46).

Because the federal courts have been readily able to prevent the use of confessions obtained during periods of illegal detention by means of their supervisory control over federal law enforcement agents and without resort to the Constitution, it does not follow that the privilege against self-incrimination is not impaired when police interrogation is permitted to go on unchecked. If interrogation during

protracted and illegal periods of detention cuts down on the privilege against self-incrimination, as it surely does, then the states can no longer avail themselves of the resulting confessions now that the privilege has been made obligatory upon them. Confessions obtained during periods of unlawful detention should be subjected to a scrutiny similar although not identical to that demanded by *McNabb* v. *United States*, 318 U.S. 332, and *Mallory* v. *United States*, 354 U.S. 449.

III.

It has frequently been recognized that the rights of privacy guaranteed by the Fourth and Fifth Amendments, and the right of counsel guaranteed by the Sixth Amendment, overlap albeit they do not coincide. Taken together, and especially in view of the federally-imposed exclusionary rule of *Mapp* v. *Ohio*, 367 U.S. 643, it is possible to derive a single principle that protects all of those rights in the context of police interrogation and yet permits legitimate investigation of crime. That principle would require the exclusion of all confessions obtained in police custody after the accusatory stage has been reached, absent an effective and unequivocal waiver of the accused's right to silence and right to counsel. Notwithstanding such a waiver, if the interrogation were to continue beyond a reasonable time that would allow for routine administrative procedures such as fingerprinting and booking the putative defendant, then the confession would still have to be excluded on the ground that the prior waiver would be presumed ineffective and not to have countenanced an illegal detention for the purpose of eliciting incriminating statements.

Argument

Once again the Court is called upon to review what has unfortunately become an American "folk ritual," the extraction of confessions by the police, *in camera* and in the absence of counsel for the accused. See Sutherland, *Crime and Confession,* 79 Harv. L. Rev. 21, 23 (1965). The unhappy task of intruding upon the enforcement of state criminal justice is made necessary because New York and a number of other states have refused to recognize, or have only grudgingly recognized, that the right to counsel and the right to silence are present in the police station—that due process forbids local police from subverting or undermining those rights. A number of the Court's decisions have made clear that those rights come into being before the commencement of the criminal trial and that they are fundamental to our system of procedural liberty, precisely in the sense of *Palko* v. *Connecticut,* 302 U.S. 319.

Predictably, a great outcry has been heard throughout the land since the end of the 1963 Term when the Court held that the pre-trial right to counsel attached during police detention once the criminal proceeding for all practical purposes had begun. *Escobedo* v. *Illinois,* 378 U.S. 478. Predictably, too, drastic extensions of *Escobedo* have been forecast both by the detractors and the supporters of that decision. Petitioner submits, however, that the present case does not require an enlargement of *Escobedo.* It does provide the Court with an opportunity to elaborate its constitutional rule in the context of a more typical factual pattern so that the rule's application to law enforcement agents around the country may become reasonably clear. Petitioner further submits that, as elaborated,

the rule will neither require the police to appoint counsel nor put an end to all police questioning. It will, on the other hand, make no distinction between the rich and the poor, the ignorant and the sophisticated, the professional criminal and the innocent accused.

I.

The Conviction Was Obtained in Violation of Petitioner's Right to Counsel Guaranteed by the Sixth Amendment.

In 1963 the Court in *Gideon* v. *Wainwright*, 372 U.S. 335, held that the Sixth Amendment's guarantee of counsel is among those rights deemed so fundamental as to be made obligatory on the states by the Fourteenth Amendment, even in non-capital cases. Thereafter, in *Massiah* v. *United States*, 377 U.S. 201, the right to counsel was found infringed when agents of the Government overheard statements by the defendant before his appearance in any courtroom but after indictment and retention of counsel. Later in the 1963 Term, the Court in *Escobedo* v. *Illinois*, 378 U.S. 478, recognized the right to counsel during police detention because, on the facts of that case, the criminal prosecution had already begun notwithstanding it was short of any "defined legal stages." See Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 947 n.96 (1965). Finally, last Term, the Court in *McLeod* v. *Ohio*, 381 U.S. 356, applied the rule to a post-indictment interrogation where counsel had been neither retained nor requested.

Gideon, *Massiah*, and *Escobedo* represented an extension of *Powell* v. *Alabama*, 287 U.S. 45, 69, which had held that a defendant, at least in a capital case, was

constitutionally entitled to "the guiding hand of counsel at every step in the proceedings against him." In *Hamilton* v. *Alabama*, 368 U.S. 52, and *White* v. *Maryland*, 373 U.S. 59, "every step" was construed to include the steps of arraignment and preliminary hearing, whenever the proceedings were such that important legal consequences could follow from the absence of defense counsel.

It is in the context of the several decisions discussed above that the present case must be viewed. *Escobedo*, of course, has more immediate impact because that case, as this one, involved the informal, non-public stage of the criminal prosecution.

First: The undisputed facts here are well within the bounds of those circumstances that were found to make the confession inadmissible in *Escobedo*:

1. The investigation was no longer a general inquiry into an unsolved crime, but had focused upon a particular suspect. The prosecution's case in chief established beyond cavil that, by three o'clock on the afternoon of the day on which petitioner was formally arrested, the crime for which he was later tried and convicted had been solved to the satisfaction of the police. Although the trial testimony is somewhat disjointed and incomplete, it is obvious that the arrest of Edward Nemeth had led directly to petitioner and connected him with the recovered stolen property. Petitioner had been apprehended and later identified by two witnesses to the crime. Surely, at that point, the investigation had begun to focus on him and the purpose of further detention and interrogation was to elicit incriminating statements. Thus, under police questioning, petitioner did incriminate himself by admitting he had robbed the dress

shop. Respondent conceded in the court below, "we do not dispute that by this time [3:00 p.m.] the defendant was in the eyes of the police and the authorities a prospective defendant, and that the police had every intention of arraigning him, as they did, the next morning." Brief for Plaintiffs-Respondents, p. 18. But petitioner was not then arraigned; instead he was transported to another precinct "for detention" (R. 25), despite the statutory requirement that he be arraigned "without unnecessary delay," N.Y. Code Crim. Pro. § 165 (Appendix A, *infra*, p. 46). When Assistant District Attorney Postal arrived at the station house with the stenographer at eleven that night, he came with a single purpose—to conduct an examination before trial. The process of investigation had come to an end; the process of convicting petitioner was well under way.

2. Petitioner was in custody. In fact, by the time of his formal arrest, several hours had already elapsed from the moment of his apprehension, his *de facto* arrest. The *de jure* arrest only served to underscore the critical nature of the proceeding as of 3:00 p.m. Nonetheless, another eight hours of in-custody restraint were to go by before petitioner's detailed confession was recorded and, after that, many more hours before his final admission in the patrol wagon the following day.

3. The sole purpose of the deposition taken by the assistant district attorney was "to elicit a confession," "to 'get him' to confess his guilt despite his constitutional right not to do so." *Escobedo* v. *Illinois*, 378 U.S. at 485, 492. It is clear that the object of the near-midnight examination was to wrap up the prosecution's case, to have a skilled attorney supervise the generation of an irrefutable record,

in question and answer form for subsequent use at trial, and thus to do "precisely what the demands of our legal order forbid: make the suspect the unwilling collaborator in establishing his guilt." *Culombe* v. *Connecticut*, 367 U.S. 568, 575. The assistant district attorney came to the station house armed with a stenographer and seeking to develop the record for a more facile conviction. He and the stenographer, Mr. Lentini, were experienced hands in the art of ex parte discovery, having appeared, a few months earlier, at a hospital bedside at 3:55 a.m. to extract the confession of a suspect who had been shot. See *Jackson* v. *Denno*, 378 U.S. 368, 371, 423 n.1. See also *United States ex rel. Weinstein* v. *Fay*, 333 F.2d 815 (2d Cir. 1964), where Mr. Postal performed a similar function in the preceding year. Apart from the reported decisions following trial and appeal, one can only assume that Mr. Postal conducted similar discovery proceedings on hundreds of occasions where clearance was later achieved by guilty plea.*

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* The experience acquired by the assistant district attorney in conducting ex parte discovery proceedings at the police station is further evidence that the assistance of defense counsel in the present case was indispensable. It also raises serious questions under Canon 9 of the American Bar Association Canons of Professional Ethics, pointedly noted by the Court in *Escobedo* v. *Illinois*, 378 U.S. at 487 n.7. A society that not only permits but indeed encourages the systematic violation of professional ethics by its public officials is seriously flawed. Its ambivalence toward law enforcement is perhaps demonstrated by the attempt last year of the Committee on the Bill of Rights of the Association of the Bar of the City of New York to obtain an opinion from the Committee on Professional Ethics as to the propriety of station house discovery. See 20 Record of N.Y.C.B.A. 477 (1965). To date such an opinion has not been published. By contrast, the Executive Committee found no difficulty in sharply criticizing a prosecutor for lack of zeal in advancing a particular cause. See 154 N.Y.L.J. No. 117, p. 1 (Dec. 20, 1965).

4. At no time was petitioner warned of his right to counsel or of his right to remain silent. While the question by defense counsel at trial indicated the police had not advised petitioner of his right to counsel, it was frustrated by the prosecution's objection which the trial court sustained (R. 24). In the court below, however, respondent did not suggest that a warning was in fact given, but instead argued strenuously that none was required under New York law. Brief for Plaintiffs-Respondents, pp. 18-26. More important, Mr. Lentini's transcript of the confession, which reads as a verbatim account of what was said, who was present, and the time of commencement and termination of the examination, contains no caution of any sort (R. 30-31).

Second: It is apparent the accusatory stage of the proceeding against petitioner had been reached when he was examined by the assistant district attorney, arguably when he was earlier questioned by the police. The case in many respects is actually stronger for petitioner than that in *Escobedo*, because here the police had already acquired more usable evidence, *cf. United States ex rel. Russo* v. *New Jersey*, 351 F.2d 429, 437 (3d Cir. 1965), and because the recorded confession and the later admission in the patrol wagon were obtained during a period of prolonged detention. Indeed, respondent effectively concedes by the statement quoted above that the critical, accusatory stage had been reached long before the taking of the recorded confession. As a result, the only ground for distinguishing the present case from *Escobedo* is the fact that petitioner had not retained counsel prior to or at the time of his apprehension and thereafter did not ask to communicate with counsel. That adventitious distinction has been seized upon by the

New York Court of Appeals in *People* v. *Gunner*, 15 N.Y.2d 226, 205 N.E.2d 852 (1965), and by a number of other state as well as federal courts.*

The courts that have so limited application of *Escobedo* have acted by simple *ipse dixit*. Their opinions have not developed a rationale for the distinction nor have they attempted to rebut criticism of it. It is remarkable that the New York Court of Appeals would take this tack in light of its significant right to counsel decisions such as *People* v. *Meyer*, 11 N.Y.2d 162, 182 N.E.2d 103 (1962), and *People* v. *DiBiasi*, 7 N.Y.2d 544, 166 N.E.2d 825 (1960), cited with approval in *Massiah* v. *United States*, 377 U.S. 201, 205. And in *People* v. *Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628 (1963), the Court of Appeals invoked the right to counsel during a detention before arraignment where there had been an attempt by previously retained counsel to consult with his client. Perhaps it is significant that the author of the *Donovan* opinion, along with the chief judge, did not join with the majority in that part of the *Gunner* decision refusing to recognize the right to counsel where there has

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* *United States ex rel. Townsend* v. *Ogilvie*, 334 F.2d 837 (7th Cir. 1964), *cert. denied*, 379 U.S. 984; *Mitchell* v. *Stephens*, 232 F. Supp. 497 (E.D. Ark. 1964); *State* v. *Miranda*, 98 Ariz. 18, 401 P.2d 721 (1965), *cert. granted*, 86 Sup. Ct. 320; *Commonwealth ex rel. Linde* v. *Maroney*, 416 Pa. 331, 206 A.2d 288 (1965); *State* v. *Worley*, 178 Neb. 232, 132 N.W.2d 764 (1965); *Bean* v. *State*, 398 P.2d 251 (Nev. 1965); *People* v. *Hartgraves*, 31 Ill.2d 375, 202 N.E.2d 33 (1964), *cert. denied*, 380 U.S. 961; *Anderson* v. *State*, 237 Md. 45, 205 A.2d 281 (1964); *State* v. *Smith*, 43 N.J. 67, 202 A.2d 669 (1964), *cert. denied*, 379 U.S. 1005; *Wansley* v. *Commonwealth*, 205 Va. 412, 137 S.E.2d 865 (1964), *cert. denied*, 380 U.S. 922; *Browne* v. *State*, 24 Wis.2d 491, 131 N.W.2d 169 (1964), *cert. denied*, 379 U.S. 1004; *State* v. *Kitashiro*, 48 Hawaii 204, 397 P.2d 558 (1964) (dictum); *State* v. *Fox*, 131 N.W.2d 684 (Iowa 1964); see also *State* v. *McLeod*, 1 Ohio St.2d 60, 203 N.E.2d 349 (1964), *rev'd per curiam*, 381 U.S. 356.

been no attempt at communication between the accused and his lawyer:

> "The court finds this argument [requiring a warning] without merit; the majority is of the opinion that the rule heretofore announced in our decisions (see, e.g., *People* v. *Failla*, 14 N.Y.2d 178, *supra*; *People* v. *Donovan*, 13 N.Y.2d 148, *supra*; *People* v. *Meyer*, 11 N.Y.2d 162; *People* v. *Noble*, 9 N.Y.2d 571; *People* v. *Waterman*, 9 N.Y.2d 561; *People* v. *DiBiasi*, 7 N.Y.2d 544) should not be extended to render inadmissible inculpatory statements obtained by law enforcement officers from a person who, taken into custody for questioning prior to his arraignment or indictment, is not made aware of his privilege to remain silent and of his right to a lawyer even where it appears that such person has become the target of the investigation and stands in the shoes of an accused. . . . The Chief Judge and I take a different view and would exclude the additional statements which the defendant made after his arrest but before his lawyer communicated with the police. . . ." 15 N.Y.2d at 233 (Fuld, J.).

In contrast, the courts that have applied *Escobedo* to the present situation have done so by exegetic opinions. For example, in *People* v. *Dorado*, 42 Cal. Rptr. 169, 398 P.2d 361, 368 (1965), the Supreme Court of California pointed out that the refusal to honor the request to communicate with counsel was important in *Escobedo* not as a prerequisite to accrual of the right but as evidence that the investigation had then shifted from the general to the focused. See Note, 53 Calif. L. Rev. 337, 361 (1965).* Escobedo's

* Accord, *United States ex rel. Russo* v. *New Jersey*, 351 F.2d 429, 436 (3d Cir. 1965); *Collins* v. *Beto*, 348 F.2d 823 (5th Cir.

request merely indicated he was more aware of his rights than is the vast majority of arrestees. The request made clear in the record what was already obvious to the police after Escobedo had been confronted with the accusation of an apparent confederate: the parties had become adversaries and the need for counsel was critical. 378 U.S. at 485.

It would be an extraordinary step backward to hold that the right to counsel does not come into existence, or is not violated, although the accusatory stage has been entered, because the uncautioned and uncounseled accused has neglected to request a lawyer. The unknowing putative defendant is the very person most in need of counsel. Escobedo was apparently aware of his right to remain silent, but the uncautioned arrestee who has not previously retained counsel will rarely be so aware. See Statement of Counsel for Respondent, N.Y. Times, Nov. 22, 1965, p. 39, col. 1. It is he who most needs counsel to advise him of his absolute right to silence. See *Escobedo* v. *Illinois*, 378 U.S. at 488. Furthermore, in *Escobedo* there was at least an opportunity for a waiver. While Escobedo, conscious of his rights, might have elected to waive them, in the present case that opportunity never arose. An accused can hardly waive rights that are unknown to him and, indeed, that would probably surprise him. See *Note*, 31 U. Chi. L. Rev. 591, 601 (1964).

The *Gunner* decision lends no rational support to a niggardly reading of *Escobedo* or the several other right to

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1965) (dictum); *Wright* v. *Dickson*, 336 F.2d 878 (9th Cir. 1964); *Galarza Cruz* v. *Delgado*, 233 F. Supp. 944 (D.P.R. 1964); *State* v. *Dufour*, 206 A.2d 82 (R.I. 1965); *State* v. *Neely*, 239 Ore. 487, 398 P.2d 482 (1965); *Commonwealth* v. *Negri*, 213 A.2d 670 (Pa. 1965) (dictum); *State* v. *Hall*, 397 P.2d 261, 268 (Idaho 1964) (concurring opinion); *Commonwealth* v. *McCarthy*, 200 N.E.2d 264 (Mass. 1964); *Campbell* v. *State*, 384 S.W.2d 4 (Tenn. 1964).

counsel decisions of this Court. It is oblivious to the nub of the opinion in *Escobedo* (at 490), where the admonition to law enforcement agents and inferior courts could not have escaped attention:

> "We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise these rights. . . ."

Apart from the language of *Escobedo*, prior decisions of the Court have made it abundantly clear that the right to counsel does not depend on a request, *Carnley* v. *Cochran*, 369 U.S. 506, 513, *McLeod* v. *Ohio*, 381 U.S. 356, and that a waiver of constitutional dimension is not to be presumed but requires "an intentional relinquishment or abandonment of a known right or privilege," *Johnson* v. *Zerbst*, 304 U.S. 458, 464.

Reliance upon failure to request a lawyer would, in addition, raise grave doubts under the equal protection clause of the Fourteenth Amendment. To provide special protection from interrogation for those who can afford counsel or who are sophisticated in the way of the station house while leaving those less able to fend for themselves with the police and the district attorney would be too incongruous to tolerate in a civilized society. See *Douglas* v. *California*, 372 U.S. 352; *Griffin* v. *Illinois*, 351 U.S. 12. The Supreme Court of California said much the same thing in *People* v. *Dorado*, 42 Cal. Rptr. 169, 398 P.2d 361, 369-70, *cert. denied*, 381 U.S. 937:

"Finally, we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status has fortuitously prompted him to make it."

The *Gunner* decision has been specifically criticized by commentators in New York, for example, Note, *Escobedo in New York*, 40 St. John's L. Rev. 51, 54-59 (1965), as has its progeny in other jurisdictions, for example, Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, CRIMINAL JUSTICE IN OUR TIME 57 (1965). Even the commentators who are distressed by *Escobedo* point out that it would be irrational to limit its scope on the basis of failure to request counsel, for example, Enker & Elsen, *Counsel for the Suspect: Massiah* v. *United States and Escobedo* v. *Illinois*, 49 Minn. L. Rev. 47, 77 (1964). Similarly, Mr. Justice White's dissenting opinion notes that the decision cannot be limited to cases where the accused has retained his own counsel or asked to consult with counsel during the course of interrogation. 378 U.S. at 495.*

* One of the peculiarities of the *Gunner* limitation is demonstrated in *People* v. *Taylor*, 22 App. Div. 2d 524, 256 N.Y.S.2d 944 (1st Dep't 1965), where *Escobedo* was applied to a police detention during which the accused asked to communicate with his family. While the decision was rightly decided, especially in light of *Haynes* v. *Washington*, 373 U.S. 503, it is ironic that, under

Third: In sanctioning a conviction "assured by pretrial examination," 378 U.S. at 487, the decision below undermines the right to counsel at trial, *Gideon* v. *Wainwright*, 372 U.S. 335, as well as the privilege against self-incrimination, *Malloy* v. *Hogan*, 378 U.S. 1. Professor Kamisar's analogy in the context of the present situation is apt. If the prosecution's case can be completed in the police station because the accused is too poor to have retained counsel or too ignorant to ask for it, then we permit the grandly proclaimed right to counsel in the judicial mansion to be utterly subverted by what we ignore in the police gatehouse. Kamisar, *supra* at 93. The ultimate trial in the mansion thus becomes " 'a very hollow thing,' " little more than "an appeal from the interrogation." 378 U.S. at 487.

The controversy now abroad in the United States is not really concerned with the significance of retained counsel or a request for counsel but instead with the validity of the *Escobedo* decision itself. It is apparent that many fervently hope the Court will withdraw from the area of police detention (at least where the confessions are ostensibly voluntary) and sharply curtail the *Escobedo* rationale. In light of the many right to counsel decisions discussed above,

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such a rule, one who knows enough to make some attempt to communicate with the outside world is immeasurably better off than one who is not endowed with even that degree of sophistication. It is also noteworthy that in *People* v. *Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628 (1963), the court was persuaded by the lawyer's unsuccessful attempt to communicate with his client in custody. See also *People* v. *Friedlander*, 16 N.Y.2d 248, 250-51 (1965). The right under discussion, after all, is the right of the accused, the one who faces ultimate trial and conviction, not the right of a lawyer to assist his client or of a father to rescue his son. See Kamisar, *supra* at 90. *Cf. People* v. *Hocking*, 15 N.Y.2d 973, 207 N.E.2d 529 (1965).

the matrix for *Escobedo* as it were, it would seem unwise if not impossible for the Court to do so. In any event, the reasons advanced by the critics are unsound.

It is hardly surprising that the criticism in large part has emanated from spokesmen for law enforcement agencies, for example, Los Angeles Police Chief Parker. See 40 Los Angeles Bar Bulletin 603 (1965).* But a majority of the United States Court of Appeals for the Second Circuit is equally concerned. It believes that the problem of detention for interrogation must be treated in a legislative, experiential manner, as in a model code of pre-arraignment procedure such as that now being drafted under the auspices of the American Law Institute. See *United States* v. *Drummond*, No. 28710 (2d Cir. Dec. 2, 1965); *United States* v. *Cone*, No. 29345 (2d Cir. Nov. 22, 1965); *United States* v. *Robinson*, No. 28883 (2d Cir. Nov. 22, 1965); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929 (1965). See also *United States* v. *Del Llano*, No. 29570 (2d Cir. Dec. 22, 1965).

Much of the concern has been caused by *Escobedo* and a number of its antecedents save *Gideon*. The prospect of street-corner caution, automatic assignment of counsel, and the inability of the police to rescue kidnap victims and stolen property are bemoaned. 53 Calif. L. Rev. at 940-51. But *Escobedo* does not eliminate street-corner questioning nor the spontaneous confession following hard upon arrest, nor does it require the police to assign counsel. Indeed, the location of the kidnap victim was properly elicited by

* Some law enforcement officials, on the other hand, have hailed the Court's recent decisions, for example, Los Angeles District Attorney Younger. See Los Angeles Times, Oct. 2, 1965, p. 1. Similarly, counsel for respondent in the present case has announced that suspects upon arrest will be advised of their right to counsel. See N. Y. Times, Nov. 22, 1965, p. 39, col. 1.

the police before any warning in *People* v. *Modesto*, 42 Cal. Rptr. 417, 398 P.2d 753 (1965), cited by Judge Friendly in his concurring opinion in *Drummond, supra* at 3464, where the statement came during the defendant's initial confrontation with the police at his home. (Subsequent, and unnecessary, confessions made by the uncautioned defendant at the station house were improperly admitted, resulting in the second reversal of a conviction for an unusually heinous crime. 398 P.2d at 759.)

If the police officers are unable to find the kidnap victim, locate the stolen property, or protect the security of the nation (threatened in *Drummond*), and if they believe their investigation will be substantially impaired by advising the suspect of his constitutional rights once the accusatory stage has been reached, they can always elect to continue without a warning. The public safety will thus be protected while the fruits of the continued investigation will merely be unavailable to the prosecution at the trial of the particular suspect whose rights had been contravened. See *The Supreme Court, 1963 Term*, 78 Harv. L. Rev. 143, 223 (1964).

The majority opinions in *Drummond, Cone,* and *Robinson* reiterate the argument of investigative necessity. Again, their anxiety appears to be largely illusory. In *Drummond*, the accused was repeatedly cautioned by the F.B.I. agents. *Cf. Otney* v. *United States*, 340 F.2d 696 (10th Cir. 1965); *Jackson* v. *United States*, 337 F.2d 136 (D.C. Cir. 1964). In *Cone*, the admissions were made shortly after initial apprehension and before reaching F.B.I. headquarters. In *Robinson*, while the admissions were made in the local station house, it is at least arguable (as it is not in the present case) that the accusatory stage

had yet to be reached at the time they were obtained. Nevertheless, the majority opinions in those three cases seem impelled to advocate unencumbered authority for law enforcement agents, at least during an initial period of some hours and where the resulting confession appears to be voluntary in the sense of fundamental fairness and the totality of circumstances. See *United States* v. *Cone, supra* at 3400. *Cf. People* v. *Price,* 63 A.C. 388, 396-97 (Cal. 1965). They apparently overlooked *Massiah,* where the admissions were obtained in a context devoid of coercion. *Cf. Griffin* v. *California,* 380 U.S. 609, 619 (dissenting opinion); *Pointer* v. *Texas,* 380 U.S. 400, 413 (concurring opinion).

These recent Second Circuit majority and concurring opinions, along with Judge Friendly's article, all reflect a degree of impatience with certain of the Court's constitutional imperatives that appear to affect criminal investigation. The difficulty, however, with their legislative solution stems from what we all know only too well, "that it is a *constitution* we are expounding," *McCulloch* v. *Maryland,* 4 Wheat. 316, 407, quoted in Friendly, *supra* at 954 n.132, and *Mr. Justice Frankfurter,* 51 Va. L. Rev. 552, 554 (1965).

Nor can the basic guarantees of counsel and freedom from testimonial compulsion be left to the states for laboratory experiment. See *Pointer* v. *Texas,* 380 U.S. 400, 413 (concurring opinion). Even if they could, the state experiments to date have proved conspicuously unsuccessful. For eighty-five years, to cite a New York example, it has been a misdemeanor under Penal Law § 1844 for a public officer wilfully and wrongfully to delay taking a person under arrest before a magistrate, and yet not a single prosecution has been reported under that statute. Most of the states have prompt arraignment statutes, collected in La Fave,

Detention for Investigation by the Police: An Analysis of Current Practices, 1962 Wash. U. L. Q. 331, 332-33; half, including Illinois, have statutes that forbid police interference with an accused's attempt to consult with his lawyer, collected in Comment, 1962 U. Ill. L.F. 641, 646. The volume of confession cases in recent years attests to the failure, if not disingenuousness, of these various state statutes.

The American Law Institute will be most helpful, of course, by drafting a code to moderate police practices and criminal investigation in general. Such a code might make great strides in regulating and confining troublesome police methods, investigative arrests, wire-tapping, and the like. It would thereby allay the disquiet of those who believe that, if particular police conduct offends the spirit of the Constitution, it is not enough to exclude the resulting evidence at the trial of the person whose rights had been violated. See Friendly, *supra* at 949.

But all this Court has ever done in the state criminal cases that come before it has been to formulate constitutionally required rules of trial procedure—precisely the point made in the concluding sentence of the *Massiah* opinion. 377 U.S. at 207. The Court has no power to compel the police to abide by state or federal statutory proscriptions, or even the implicit commands of the Constitution. See *Pugach* v. *Dollinger*, 365 U.S. 458; *Schwartz* v. *Texas*, 344 U.S. 199. If an act of police lawlessness impinges upon rights protected by the Fourteenth Amendment, the Court can only see to it that the evidence obtained is rendered inadmissible at the trial of the party aggrieved. On the other hand, no legislature can adopt a code that curtails the Bill of Rights. Until now it has been the ultimate duty of this Court to interpret and apply the Constitution, and

until now there has been little doubt that the Constitution is present in the police station.

II.

The Conviction Was Obtained in Violation of Petitioner's Privilege Against Self-Incrimination Guaranteed by the Fifth Amendment.

Police invasion of privacy is disruptive of our system of procedural liberty, especially when carried out purposefully with an intent to elicit self-incriminating evidence. The decision below tacitly approves a serious incursion into petitioner's right of privacy under the Fourth, Fifth, and Fourteenth Amendments, as recognized by recent decisions of the Court in *Griffin* v. *California*, 380 U.S. 609; *Malloy* v. *Hogan*, 378 U.S. 1; *Ker* v. *California*, 374 U.S. 23; *Wong Sun* v. *United States*, 371 U.S. 471; *Mapp* v. *Ohio*, 367 U.S. 643; *cf. Griswold* v. *Connecticut*, 381 U.S. 479.

The Court has hitherto been reluctant to apply the federal exclusionary rule, derived from *McNabb* v. *United States*, 318 U.S. 332, as reaffirmed by *Mallory* v. *United States*, 354 U.S. 449, to state convictions. That reluctance has been attributable to the distinction between the supervisory power of the Court over federal agents and its constitutional power to review state convictions obtained in violation of the Fourteenth Amendment. In addition, it may be supposed that the Court is loath to impose upon the states a sometimes technical rule that may be inadvertently violated by law enforcement agents who delay arraignment for a comparatively short time. This does not mean that because *McNabb-Mallory* is a judge-made rule, enforced with rigor of a statute, there are no constitutional ramifica-

tions to an illegal detention. *McNabb* never reached the constitutional questions there raised because the Court was able to reach decision solely on the basis of its supervisory power. After *McNabb* and until *Mapp*, there was no need to consider further those questions because Rule 5(a) of the Federal Rules of Criminal Procedure codified the exclusionary rule for the federal courts, while at the same time the doctrine of *Wolf* v. *Colorado*, 338 U.S. 25, precluded its application to state convictions.

The significance of *Mapp* lies in the remedy it provides under the Fourth Amendment. For the first time in the history of our federal system we have a constitutionally-required exclusionary rule imposed upon the states and applicable to relevant and reliable evidence. Previously, federal supervision of state convictions was restricted to reviewing trials that were inherently incompatible with the due process clause because they were predicated on coerced confessions or other unfairness at the trial. Use of a coerced confession was thought to be so abominable as to reduce the trial itself to something less than that fair hearing required by an ordered system of liberty. See *Lisenba* v. *California*, 314 U.S. 219, 236. But in the cases involving attempts to exclude illegally obtained evidence, the antecedent violation of the defendant's rights was distinguished from the introduction of reliable evidence secured by means of that violation. This was the rationale of *Wolf* and its sequelae.

With the advent of *Mapp*, however, we now have a true exclusionary rule that frankly operates as a chastisement of the police irrespective of whether the trial is unfair in the ~~custody~~ custodial sense. And, more recently, it has been recognized that the exclusionary rule protects "against the overhearing of verbal statements as well as against the more

traditional seizing of 'papers and effects'." *Wong Sun* v. *United States*, 371 U.S. 471, 485, made applicable to the states by *Traub* v. *Connecticut*, 374 U.S. 493. A constitutional rule of exclusion is equally appropriate in the case of illegal detention, at least where it is clear that the objective of the detaining officers is to use the arrestee as the primary device for preparing the prosecution's case. *Cf. Culombe* v. *Connecticut*, 367 U.S. 568, 632.

First. Petitioner was detained by the police for a period of approximately twenty-four hours before being arraigned by a magistrate and without ever being advised of his right to remain silent (R. 17, 23, 30-31). See *People* v. *Kelly*, 264 App. Div. 14, 16, 35 N.Y.S.2d 55 (3rd Dep't 1942) (twenty-four hour detention illegal as a matter of law). During that time he was interrogated first by the police, then by an assistant district attorney, and finally by the police again—"in the patrol wagon the next day going to court" (R. 23). Testimony as to incriminating statements extracted during each of those interrogations was admitted at trial (R. 23, 20-21, 30-31). Further, petitioner was detained without arraignment for at least eighteen hours after he had been formally charged by the police at 3:00 p.m. and had admittedly become a "prospective defendant." See Brief for Plaintiffs-Respondents, New York Court of Appeals, p. 18. At the time petitioner was arrested *de jure*, a magistrate was available for arraignment. See Rule 3, New York City Criminal Court Act, which provides (as did Section 101 of the predecessor Act then in effect) that the Criminal (formerly Magistrate's) Court shall be open daily from 9:00 a.m. until 4:00 p.m.

New York law provides that, upon arrest, "the defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of

the day or night." Upon arraignment "the magistrate must immediately inform him of the charge against him and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had." The magistrate "must allow the defendant a reasonable time to send for counsel." Sections 165, 188, 189 of the New York Code of Criminal Procedure (Appendix A, *infra*, pp. 46-47).

Thirty-four years ago, the New York Court of Appeals declared:

> "The police are guilty of oppression and neglect of duty when they wilfully detain a prisoner without arraigning him before a magistrate within a reasonable time. (Code Crim. Pro. § 165.) The conclusion is inescapable that they do this for the purpose of subjecting him to an inquisition impossible thereafter. . . ." *People* v. *Mummiani*, 258 N.Y. 394, 399-400, 180 N.E. 94 (1932).

The court in *Mummiani* went on to state that an officer who unreasonably delays arraignment should be prosecuted by the district attorney and that "a district attorney who wilfully neglects to initiate such a prosecution after knowledge of the offense may be guilty of a crime himself." 258 N.Y. at 400. Notwithstanding the frustration of that pious hope, the New York Court of Appeals has not found it necessary to supply an effective remedy for the violation of rights held out by state law. Absent coercion or, in recent years, a demand for or by counsel, a confession elicited "during a period of illegal detention following an unlawful arrest," is admissible in evidence at trial in New York. *People* v. *Everett*, 10 N.Y.2d 500, 507, 180 N.E.2d 556, 559 (1962), *cert. denied*, 370 U.S. 963 (decided prior to *Wong Sun*).

Indeed, having ruled that confessions obtained in the absence of counsel after but not before arraignment are inadmissible, *People* v. *Meyer*, 11 N.Y.2d 162, 182 N.E.2d 103 (1962), *People* v. *Rodriguez*, 11 N.Y.2d 279, 183 N.E.2d 651 (1962), the present New York rule not only sanctions delays in arraignment but affirmatively encourages them as the last opportunity to secure a usable confession.

Thus, the decision below tacitly approves the use at trial of a confession extracted from a presumptively innocent accused arrested on probable cause but further detained without authority of statute, without judicial supervision of any sort, without opportunity to consult with counsel or friends, without being told of the charges against him or the rights guaranteed him, and, short of coercion, without limit. It cannot reasonably be suggested today that such a procedure does not fall below the minimal standards implicit in the concept of ordered liberty. Quite clearly it collides with the privilege against self-incrimination as well as several other rights explicitly guaranteed by the Constitution.

Second. The privacy concept underlies both the Fourth and Fifth Amendments and was the root force on which the framers drew when attempting to curtail the power of government in the area of arbitrary arrest, unreasonable search and seizure, compulsory self-incrimination, and Star Chamber inquisition. See *Mapp* v. *Ohio*, 367 U.S. at 656-57. Illegal detention based on an unreasonable delay in arraignment, with all the trappings of police dominion over the arrestee and the awesome atmosphere of the station house, represents invasion of privacy in its most unattractive form. Police seizure of the person and the interrogator's search through the arrestee's mind are at least as pernicious as

the breaking of doors and the "rummaging of drawers." See *Boyd* v. *United States*, 116 U.S. 616, 630, quoted in *Mapp* at 646. Moreover, an illegal detention against the arrestee's will amounts to deprivation of his personal liberty of movement and association guaranteed by the due process clause itself. See *Culombe* v. *Connecticut*, 367 U.S. 568, 573.

The Fifth Amendment privilege against self-incrimination, only recently held applicable to the states under the Fourteenth Amendment, *Malloy* v. *Hogan*, 378 U.S. 1, adds both breadth and particularity to the Fourth Amendment right of personal security. The privilege against self-incrimination goes beyond the long-standing prohibition of coerced confessions and is the "essential mainstay" of our accusatorial system. 378 U.S. at 7. When the petitioner here became the accused he became entitled to rely on that mainstay. While this is not a case of confessions coerced "by fear of hurt, torture or exhaustion," *Adamson* v. *California*, 332 U.S. 46, 54, it is also not a case of a "free choice to admit, to deny, or to refuse to answer." *Lisenba* v. *California*, 314 U.S. 219, 241, quoted in *Malloy*, 378 U.S. at 7. A choice containing concealed alternatives, after all, is no choice at all. See HOLMES, THE COMMON LAW 94 (1881). The alternative of silence was carefully, designedly, and protractedly concealed from petitioner.

The New York courts have recognized that to admit voluntary confessions obtained after arraignment or indictment in the absence of counsel would violate the privilege against self-incrimination, *e.g.*, *People* v. *Waterman*, 9 N.Y.2d 561, 175 N.E.2d 445 (1961). *Cf. People* v. *Robinson*, 13 N.Y.2d 296, 196 N.E.2d 261 (1963) (privilege violated by interrogation following sham arraignment). That deter-

mination has been bottomed on the proposition that arraignment or indictment "marks the *formal* commencement of the criminal action." 9 N.Y.2d at 565 (emphasis added). But it is perfectly clear that the accrual of a constitutional right cannot depend upon such a formal, nonfunctional test —especially where the police can delay the "formal commencement" at will. See *Escobedo* v. *Illinois*, 378 U.S. at 486, 487 n.6. Yet the decision below authorizes a procedure whereby petitioner, having been deprived of his liberty without any process of law and long after the authority of the original arrest had been exhausted, was obliged to participate in a program of interrogation designed to obtain his assistance in creating the record that would be used to convict him at trial. Surely the Fifth Amendment privilege is subverted by such a detention.

Since the decisions of the Court in *McNabb* v. *United States*, 318 U.S. 332, and *Mallory* v. *United States*, 354 U.S. 449, each of the policy considerations there seen as requiring an exclusionary rule have been recognized to be of constitutional status. Those policies are (a) the necessity of interposing the impartial judgment of a judicial officer between the citizen and the police, 354 U.S. at 452, *cf. Wong Sun* v. *United States*, 371 U.S. at 481-82, *Aguilar* v. *Texas*, 378 U.S. 108, 111; (b) the necessity of averting opportunities for "third degree" interrogation, 354 U.S. at 453, *cf. Gallegos* v. *Colorado*, 370 U.S. 49; (c) the necessity of forestalling "a process of inquiry that lends itself . . . to eliciting damaging statements" to support arrest and guilt, 354 U.S. at 454, *cf. Escobedo* v. *Illinois*, 378 U.S. at 492; (d) the necessity of affording the suspect advice as to his right to counsel and to silence before "any judicial caution [has] lost its purpose", 354 U.S. at 455, *cf. Escobedo* v. *Illinois*, 378 U.S. at 486-88. Those policies, having been

recognized to be both constitutionally required and enforceable against the states, should therefore be "enforceable against them by the same sanction of exclusion as is used against the Federal Government." *Mapp* v. *Ohio*, 367 U.S. at 655. See *Wong Sun* v. *United States*, 371 U.S. at 481 n.9, 486 n.12; Broeder, *Wong Sun* v. *United States: A Study in Faith and Hope*, 42 Neb. L. Rev. 483, 564-94 (1962). Accordingly, the confession and admissions admitted below should have been excluded by reason of the constitutional premises of the *McNabb-Mallory* principle.

It is no answer at this juncture in our procedural history to claim that the privilege only protects against testimonial compulsion at trial. See Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 942 n.72 (1965). *Escobedo* speaks unqualifiedly in terms of the accused's "absolute right to remain silent" in the police station. 378 U.S. at 485. *Malloy* speaks with equal emphasis, although implicitly, by its analogy to the confessions rule and its reliance upon *Boyd* v. *United States*, 116 U.S. 616. 378 U.S. at 6-10. See Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 Ohio State L.J. 449, 466 (1964). The concept is not new; it was recognized twenty-five years ago in *Lisenba* v. *California*, *supra* at 241. And the right to silence in the police station can only derive from the privilege, since the citizen must ordinarily assist and cooperate with the police. See *Stein* v. *New York*, 346 U.S. 156, 184. It can even be fairly maintained that the purpose of the privilege absent a waiver is to protect an accused from all questioning, whether before or at the trial. See Kamisar, *supra* at 25.

Third. Application of the *McNabb-Mallory* principle, or a variant for imposition upon the states, serves as well to

protect a number of additional constitutional rights that were here violated. See Broeder, *supra* at 573-79:

1. Illegal detention, caused by delay in arraignment, *pro tanto* abridges the defendant's right to bail under the Eighth Amendment.

2. Delay in arraignment, involving as it does the unauthorized incarceration of a presumptively innocent suspect for an impermissible purpose, violates the prohibition of cruel and unusual punishments. *Cf. Robinson* v. *California*, 370 U.S. 660, 667.

3. Delay in arraignment inherently involves a deprivation of liberty without due process of law in violation of the Fifth and Fourteenth Amendments:

> " . . . Since the Fourteenth Amendment prohibits the States from inducing a person to confess through 'sympathy falsely aroused'; *Spano* v. *New York, supra,* at 323, or other like inducement far short of 'compulsion by torture,' *Haynes* v. *Washington, supra,* it follows *a fortiori* that it also forbids the States to resort to imprisonment, as here, to compel him to answer questions that might incriminate him. . . . " *Malloy* v. *Hogan,* 378 U.S. at 8.

4. Delay in arraignment involves a partial denial of the defendant's right adequately to prepare a defense implicit in the Fifth, Sixth, and Fourteenth Amendment guaranties of due process, right of counsel, right to process for obtaining witnesses, and right to be informed of the nature and cause of the accusation. Delay in this context is particularly odious since it is designed to assist the prosecutor in his preparation for trial.

5. Delay in arraignment involves, *pro tanto*, a suspension of the privilege of the writ of habeas corpus in violation of Article I, Section 9 of the Constitution.

Most important, the illegal detention because of delay in arraignment cuts down and whittles away at the privilege against self-incrimination. Indeed, in light of *Griffin* v. *California*, 380 U.S. 609, the conclusion is inescapable that such detentions are fraught with Fifth Amendment consequences. In *Griffin*, the defendant never uttered a sound at trial (or presumably before). Here, on the other hand, where petitioner was obliged to testify upon deposition without counsel present and while in custody, can it reasonably be argued that the illegally protracted detention, with all the coercive impingements of the station house, did not cut "down on the privilege"? 380 U.S. at 614.

It has been suggested that there can be no state analogy to the *McNabb-Mallory* rule, because the Constitution does not require bringing an accused before a magistrate. See Note, 73 Yale L.J. 1000, 1001 n.8, 1011 n.69 (1964). But, as noted above, most of the states do have prompt arraignment statutes similar to New York's, and all of them do have magistrates. Even in their absence, constitutional liberties hardly depend upon such specifics; the Constitution does not permit unlimited police detention. As we have said, freedom of movement and association is at once abridged and, since the police do not commit to bail or assign counsel, Sixth and Eighth Amendment rights as well. Finally, since a valid arrest does not contemplate indefinite detention, the Fourth Amendment protection against seizure of the person is likewise affected.

Thus, while we are dealing with a number of constitutional rights previously "declared enforceable against the

States," we have yet to see "the same sanction of exclusion as is used against the Federal Government." *Mapp* v. *Ohio*, 367 U.S. at 655. That constitutional deformity is no less fundamental here than it was in the case of unreasonable search and seizure.

III.

The Fifth and Sixth Amendments Require That the Conviction Be Reversed.

While either of the foregoing approaches to the present case requires reversal, because of the importance of the question involved, the disagreement among the lower courts, see Note, Temple L.Q. 97, 100 (1965), and the grant of certiorari this Term to four related cases, Nos. 759, 761, 762, 584, petitioner suggests the following principle to govern his situation and the many like it.

First. As we have seen, lengthy police detention often raises interrelated questions under the Fifth and Sixth Amendments (and the Fourth Amendment, as well, where the suspect is iliegally seized or held over-long). Rather than decide each case according to the particular right most seriously aggravated, the Court can deal with the generality of police detention cases by articulating a rule that renders meaningful most of the protected rights of the affected amendments, in tandem. *Cf. Griswold* v. *Connecticut*, 381 U.S. 479, 484-85. Thus, beginning with the inchoate Fourth Amendment issue inevitably present when a person is apprehended, the Court should expand upon the exclusionary rule of *Mapp* v. *Ohio*, 367 U.S. 643, and *Wong Sun* v. *United States*, 371 U.S. 471, to cover all police detention and all police interrogation whenever the accusatory stage of the

criminal proceeding has been reached or whenever the detention has become unlawful.

The principle suggested, derived from a composite of past decisions, is simple. It would render inadmissible at state trials incriminating statements obtained during any stage of the criminal proceeding unless the accused had been effectively warned of his rights and had been given effective opportunity to exercise them. To insure adequate protection of those rights, it would further render inadmissible any incriminating statements obtained from an accused during a period of illegal detention under any circumstances. In practice, it would operate as follows: When the proceeding has become accusatory, the police or prosecutor will be obliged to warn the accused of his absolute constitutional right to silence and of his right to consult with counsel *before* talking any further with the police. If the accused thereupon intelligently and effectively waives his right to silence and his right to immediate consultation with counsel, the interrogation can continue. If the accused wishes to consult with previously retained counsel, he will be permitted to do so and the interrogation will not continue while the police are awaiting the lawyer's arrival. If the accused does not already have counsel and is indigent, the police may adopt one of two procedures. They may suggest the local public defender or Legal Aid Society and provide access to telephone communication. On the other hand, if the police are unwilling or unable to recommend such counsel, they will simply terminate the interrogation at that point.

In the event counsel comes to the station house, interrogation will or will not continue thereafter, depending on the particular lawyer's advice. The lawyer's continued pres-

ence will likewise be a matter for his determination. If the accused waives his right to silence and his immediate right to counsel, the interrogation may continue but only during a period of reasonable detention in the sense of *Mallory* v. *United States,* 354 U.S. 449, that is, during the routine administrative process of identification, booking, fingerprinting, and transporting the accused to arraignment or preliminary hearing.

After a reasonable period for these administrative procedures has elapsed, if the accused has not then been brought before a judicial officer, the interrogation must terminate notwithstanding the prior waiver. At this point the rule analogous to *McNabb-Mallory* will come into play as a result of the Fifth Amendment privilege against self-incrimination. Under that privilege, it would be presumed that the accused's right to be free from testimonial compulsion was being undermined by the illegal detention and hence that the prior waiver, made in police custody, was not effective. And it would be presumed that the prior waiver, in any event, did not include waiver of the accused's right to be free of illegal restraint, that is, it could not be deemed to have contemplated police illegality. Thus, if the police obtain a confession or admissions after the accusatory stage has been reached but in the absence of effective waiver or in the face of a request to consult with counsel that is not honored, or if the confession or admissions are obtained during a period of illegal detention, they cannot be introduced at a subsequent trial of that accused.

Second. The suggested practice may appear unnecessarily detailed, precisely the code of criminal procedure that Judge Friendly feels the Court should not endeavor to draft. Friendly, *supra* at 953-56. The description set forth above,

however, is merely a series of specific examples to show how the principle would work. That principle, stark in its simplicity, is founded on *Escobedo* v. *Illinois*, 378 U.S. 478, and *Malloy* v. *Hogan*, 378 U.S. 1, taken together. It is necessary to view those decisions together, because their combined application can govern the vast majority of in-custody situations, and at the same time lend predictability to the scope and permissible methods of criminal investigation.

Escobedo must be amplified by an exclusionary rule based in part on *Malloy*, because the alternative—necessary to forestall police abuse by means of prolonged detention of the limited waiver concept—would be automatic assignment of counsel at the station house, an impractical solution and one which the police are ill-equipped to achieve. While it has been suggested that immediate assignment of counsel is required under *Escobedo*, Note, 32 U. Chi. L. Rev. 560, 579-80 (1965), the Court has emphasized that the Fifth and Sixth Amendment rights at stake during a detention can be waived. 378 U.S. at 490 n.14. On the other hand, under *Johnson* v. *Zerbst*, 304 U.S. 458, 464, the burden is on the police to establish that there has been a waiver. Here, the burden will be especially heavy, because the party alleged to have waived will be in the control of the party alleging waiver. *Cf. Commonwealth ex rel. Craig* v. *Maroney*, 352 F.2d 30, 31 (3d Cir. 1965); *Pece* v. *Cox*, 74 N.M. 591, 396 P.2d 422 (1964) (warning typed on the confession). And if the accused is not competent to waive his constitutional rights, the police will simply have to choose between ending the interrogation and providing access to counsel.

To establish waiver, the police will not only have to prove it as a matter of record, presumably signed or initialed by

the accused (and perhaps electronically recorded), they will also have to treat it with some constitutional respect. In other words, if the detention becomes prolonged the prior waiver will be deemed ineffective and the privilege against self-incrimination will become absolute and applied in a manner similar to that required by *McNabb-Mallory*. Such a tandem approach to the Fifth and Sixth Amendment rights will prevent police abuse of the waiver doctrine and yet will permit reasonable investigation and questioning.

For example, it will ordinarily permit street corner investigation and some questioning and screening at the station house to verify alibis, place witnesses in line-ups, and the like. Moreover, some post-arrest interrogation will still be permissible. While investigative arrests without probable cause have been curtailed by *Wong Sun*, at least where a confession results from the arrest, questioning will be permitted after apprehension on probable cause so long as the accusatory stage has not been reached. *Cf.* DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 35 (1958). That will depend on the facts of the particular case, but, as the facts here indicate, it will not be unusual if some questioning is appropriate after the apprehension. Petitioner appears to have been arrested on probable cause, because he was identified by a confederate. The initial police investigation afforded him an opportunity to disprove, if he desired, that accusation. His right to counsel probably did not attach, however, until after he reached the police station and was identified by the eyewitnesses. At the very least, it attached at the time of his *de jure* arrest; under either interpretation of the present facts, some time elapsed between petitioner's apprehension and the commencement of the criminal proceeding against him.

Third. The principle suggested will not put an end to all criminal investigation or police questioning at the station house.* Indeed, it will not be dissimilar in operation from that under which federal law enforcement agents presently perform with such success. See Hoover, *Civil Liberties and Law Enforcement: The Role of the FBI*, 37 Iowa L. Rev. 175, 178, 182 (1952). *Cf.* U.C.M.J., art. 31(b), 10 U.S.C. § 831(b). As for possible effect on the crime rate, we should heed the advice of a former prosecutor who functioned ably in a jurisdiction governed by *McNabb-Mallory*:

> "... Prosecution procedure has, at most, only the most remote causal connection with crime. Changes in court decisions and prosecution procedure would have about the same effect on the crime rate as an aspirin on a tumor of the brain." Address by David C. Acheson, October 15, 1964, quoted in Herman, *supra* at 500 n.270.

See also REPORT AND RECOMMENDATIONS OF THE COMMISSIONER'S COMMITTEE ON POLICE ARRESTS FOR INVESTIGATION 17 (1962) (Horsky Report); Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 Cornell L.Q. 436, 454-71 (1964). Nor will it be necessary for the police to assign counsel. If the accused waives his then-existing rights, interrogation may continue. In the absence of a meaningful waiver, the police can choose between permitting consultation with counsel or terminating any further interrogation.

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* It is interesting that one of the cases cited by Chief Judge Lumbard in *United States* v. *Cone*, No. 29345 (2d Cir. Nov. 22, 1965) at 3404, as evidence of the need for broad police powers of investigation, involved offensive police conduct raising serious questions of coercion in the traditional sense. See *United States ex rel. Daniel* v. *Wilkins*, 292 F.2d 348 (2d Cir. 1961), *cert. denied*, 372 U.S. 917.

Application to the states of such a principle should promote "the avoidance of needless conflict between state and federal courts" upon which, it was said in *Elkins* v. *United States*, 364 U.S. 206, 221, "the very essence of a healthy federalism depends." The importance of obtaining state and federal adherence to "the same fundamental criteria" was further stressed in *Mapp*, 367 U.S. at 658, especially where the rights asserted by the state accused draw on the same constitutional fount as those guaranteed his federal counterpart. Finally, the principle should largely eliminate the necessity in confession cases of inquiring into the nagging question of inherent coercion. See *Herman, supra* at 452-58.

The Court in the past, *e.g.*, *Brown* v. *Board of Education*, 347 U.S. 483, has overcome the national fallacy of assuming that "what is familiar is what is right." See Remarks of Yale Kamisar, *Dedication Ceremonies, University of Kentucky College of Law Building*, Dec. 4, 1965, p. 30. Similarly, the Court is now called upon to alter, and thereby to civilize, the American folk ritual of longstanding. In the process it will save the police station from forever remaining our "vestibule of . . . Hell." See ALBERT CAMUS, THE FALL 84 (O'Brien Trans. 1956). It will enable local police and prosecutors to acquire some very necessary self-respect and respect for the system they serve. It will enable disadvantaged persons and minority groups to confront the police with something less than the skepticism that has gone before and unfortunately had such an exacerbating influence on the major issue of our time. See Edwards, *Order and Civil Liberties: A Complex Role for the Police*, 64 Mich. L. Rev. 47, 54 (1965); *Escobedo* v. *Illinois*, 378 U.S. 478, 490 n.13.

The Government is not neutral when it proceeds criminally against the individual; the corresponding duty arising from that action must be to insure absolutely that the constitutional protections are available to whomever proceeded against.

Conclusion

For the foregoing reasons, the judgment of the Court of Appeals of New York should be reversed.

Respectfully submitted,

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